No. 2626

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MINERS' & MERCHANTS' BANK, a corporation,
Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR.

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Seattle, King Co., Wash.

LOWMAN & HANFORD CO., SEATTLE

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BRIEF OF DEFENDANT IN ERROR.

Inasmuch as the presentation made by the plaintiff in error is somewhat discursive, we shall state the facts as follows:

The plaintiff in error had been insured under a policy which reads as follows:

(Cover)

**THE
UNITED STATES FIDELITY
AND GUARANTY COMPANY.**

**FIDELITY BOND
No..................**

**In Behalf of
MACK A. MITCHELL
to
MINERS' & MERCHANTS' BANK,
Ketchikan, Ala.
Date, April 1st, 1906.
Expired, April 1st, 1907.**

**CALHOUN, DENNY & EWING,
DISTRICT AGENTS
Seattle, Wash.**

Form O.S. 1 M-9-7-03.

CAPITAL PAID IN CASH, $1,700,000.

Amount, $25,000.00. **Annual Premium, $100.00.**

Bond No. 450. No. 5764.

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY
Home Office,
Baltimore, Md.

WHEREAS, MINERS' & MERCHANTS' BANK, KETCHIKAN, ALASKA, hereinafter called "The Employer", is employing or intends to employ MACK A. MITCHELL in the capacity of CASHIER, hereinafter called "The Employee," and has filed with THE UNITED STATES FIDELITY AND GUARANTY COMPANY, hereinafter called "The Company," an application specifying the amount of security required from said Employe, and has applied to the Company for the grant of this bond; and

WHEREAS, the Company in consideration of the sum of one hundred and 00/100 dollars, now paid as a premium from April 1st, 1906, to April 1st, 1907, at 12 o'clock noon, has agreed upon the terms, provisions and conditions herein contained to issue this bond to the Employer; and

WHEREAS, the Employer has heretofore delivered to the Company certain representations and promises relative to the duties and accounts of the Employe and other matters, it is hereby understood and agreed that those representations and such promises, and any subsequent representation or promise of the Employer, hereafter required by or lodged with the Company, are hereby expressly warranted to be true.

NOW, THEREFORE, THIS BOND, WITNESSETH, that for the consideration of the premises, the Company shall, during the term above mentioned, or any subsequent renewal of such term and subject to the conditions and provisions herein contained, at the expiration of three months next, after proof, satisfactory to the Company, as hereinafter mentioned, make good and reimburse to the said Employer, such pecuniary loss as may be sustained by the Employer by reason of the fraud or dishonesty of the said Employe in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said Employe from the service of the Employer within the period of this Bond, whichever of these events shall first happen; the Company's total liability on account of said Employe under this Bond or any renewal thereof, not to exceed the sum of TWENTY-FIVE THOUSAND ($25,000) DOLLARS.

Provided, That on the discovery of any act capable of giving rise to a claim hereunder, the Employer shall, at the earliest practical moment, give notice thereof to the Company, and any claim made under this Bond shall be in writing addressed to the Company at its head office in the City of Baltimore; and shall within three months after the discovery thereof, at the Employer's expense, furnish to the Company reasonable particulars and proofs of the correctness of said claim, and such particulars, if required, shall be verified by affidavit.

Provided Further, That the Company shall not be liable, by virtue of this Bond, for any act or thing done or left undone by the Employe in obedience to, or in pursuance of an instruction or authorization received by him from the Employer or any superior officer, or for any mere error of judgment or bona fide mistake, or any injudicious exercise of discretion on the part of the Employe, in and about all or any matters wherein he shall have been vested with discretion either by instruction or by the rules and regulations of the Employer.

Provided Further, That the Company shall not be liable under this Bond for the amount of any balance that may be found due the Employer from the Employe, and which may have accrued prior to the date hereof, it being the true intent and meaning of this Bond that the Company shall be responsible as aforesaid for moneys, securities, or property diverted from the Employer within the period specified in this Bond.

And Provided, Also, That this Bond is granted upon the express understanding or agreement that as against every corporation or person now being or hereafter becoming security or surety and upon every security held by the Employer for the Employe in his employment as aforesaid, the Company shall have and possess the right of ratable contribution and all other

rights and remedies, both legal and equitable, of co-sureties.

And Also, That, should the Employe become guilty of an offence covered by this Bond, the Employer will immediately, on being requested by the surety to do so, lay information before a proper officer covering the facts and verify the same as required by law and furnish the Company every aid and assistance, not pecuniary, capable of being rendered by the Employer, his or its agents and servants, which will aid in bringing the Employe promptly to justice, and such action when required of the Employer shall be a condition precedent to recover under this Bond.

Provided, That the Company shall have the right, upon giving thirty days' notice in writing to the Employer, to cancel this Bond at the expiration of said thirty days; and if the bond shall be so cancelled, the Company shall refund the proportion of the premium for the unexpired term of risk.

Provided, That the Employe may perform other duties than those properly belonging to the position mentioned in this Bond without notice of such change being given to the Company.

Provided, That the premium due the Company for becoming surety for the Employe named in this Bond shall be paid within thirty days after the delivery hereof, and if not so paid, this Bond shall be void from the beginning, and the Company shall not be liable for any loss hereunder.

And Provided, Lastly, That this Bond is also subject to the following conditions:

That, any misstatement or suppression of fact in any claim made hereunder renders this Bond void from the beginning.

This Bond will become void as to any claim for which the Company would otherwise be liable, if

the employer shall fail to notify the Company of the occurrence of the act or commission out of which said claim shall arise immediately after it shall come to the knowledge of the Employer; and the knowledge of a President, Vice-President, Director, Secretary, Treasurer, Manager, Cashier or other like executive officer shall be deemed under this contract the knowledge of the Employer. And upon the making of any claim hereunder, this Bond shall wholly cease and determine as regards any act or omission of the Employe, committed subsequent to the making of such claim, and it shall be surrendered to the Company on the payment of such claim.

THAT, after the expiration of the Company's liability hereunder, and no claim having been presented the then unexpired portion, if any, of the term for which this bond was granted, shall apply to any new Employe whose risk, to the same amount, the said Company may at that time assume or the Company shall at the election of the Employer return to the Employer the unearned premium on return of this Bond for cancellation.

IT IS FURTHER MADE AN EXPRESS CONDITION of this Bond that no suit or action of any kind against the Company for the recovery of any claim upon, under or by virtue of this Bond, shall be sustainable in any court of law or equity, unless such suit or action shall be commenced, and the process served on the Company within the term of twelve months next after the date of filing notice of a claim therefor as hereinbefore provided; in case any suit or action shall be commenced against the Company after the expiration of said period of twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

THAT no one of the above conditions, or of the provisions contained in this Bond, shall be

deemed to have been waived by or on behalf of the Company, unless the waiver be clearly expressed in writing over the signature of its President and Secretary, and its seal thereto affixed.

THAT the Company, upon the execution of this Bond, shall not thereafter be responsible to the Employer, under any bond previously issued to the Employer on behalf of said Employe, and upon the issuance of any Bond subsequent hereto upon said Employe in favor of said Employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) Bond shall be in force at one time, unless otherwise stipulated between the Employer and the Company.

AND THE EMPLOYE doth hereby for himself, his heirs, executors, and administrators, covenant and agree to and with the Company that he will save, defend and keep harmless the Company from and against all loss and damage of whatever nature or kind, and from all legal and other costs and expense, direct or incidental, which the Company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it to recover under this Bond, and without notice to him thereof) or for, or by reason or in consequence of, the Company having entered into the present Bond.

IN WITNESS WHEREOF, the said MACK A. MITCHELL (the Employe) has hereunto set his hand and seal, and the Company has caused this Bond to be sealed with its corporate seal, duly attested by the signatures of its Attorneys in Fact, this 1st day of May, one thousand nine hundred and six.

Signed, sealed and delivered by the Employe

at..

....L. S.

In the presence of

....

....

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

A. KENNARD, Attorney-in-Fact.

DOUGLAS R. TATE, Attorney-in-Fact.

This policy was continued in force by virtue of renewal certificates issued each year, the last renewal certificate being issued April 1, 1912, so that the policy was in force until April 1, 1913.

On April 1, 1913, the insurance terminated, save that under the terms thereof the insurer would be liable for any loss discovered within six months after the termination of said policy. From that time until November 25, 1913, the plaintiff in error had no policy.

On the last named date the plaintiff in error secured from the defendant in error another policy of insurance, which reads as follows:

UNITED STATES FIDELITY & GUARANTY COMPANY.
Capital Paid in Cash, $2,000,000.
Total Resources Over $7,400,000.
Home Office:
Baltimore, Md.

No. 27999. $25,000.00

The UNITED STATES FIDELITY AND GUARANTY COMPANY, as Insurer, for a premium of SIXTY-TWO and 50/100 ($62.50) DOLLARS, hereby guarantees to pay to the MINERS & MERCHANTS BANK OF KETCHIKAN, ALASKA, the Employer, such pecuniary loss as the Employer shall sustain (limited only by the provisos hereof) of money,

bonds, debentures, scrips, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, currency, merchandise or other property, including that for which Employer is responsible, occasioned by any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication or misappropriation or any criminal act by MACK A. MITCHELL, directly or through connivance in any position and at any location in the Employer's employ, and during the period commencing upon the date hereof and continuing in the sum of TWENTY-FIVE THOUSAND ($25,000.00) DOLLARS until the termination of this insurance.

PROVISOS:

1. In the event of the recovery of any loss, or portion thereof, from other than insurance, the Employer shall be entitled thereto until fully reimbursed, the excess, if any, to be paid to the Insurer.

2. The Employer shall deliver notice of any default hereof to the Insurer at its Home Office within ten (10) days after the discovery of such default. All claims shall be submitted, showing the items and dates of the losses, and delivered in writing to the Insurer at its Home Office within three (3) months after their discovery. The Insurer shall have two (2) months after claim has been presented in which to verify and pay the same, during which time no legal proceeding shall be brought against the Insurer as to that claim, nor at all as to that claim after the expiration of twelve (12) months from its date.

3. This insurance shall only terminate by:

(1) The Employer giving notice in writing to the Insurer specifying the date of termination.

(2) The Insurer giving thirty (30) days' notice in writing to the Employer. (The Insurer to refund unearned premium in the above cases.)

(3) The nonpayment of premium for a period of three (3) months beyond date due; all premiums being due in advance.

4. The discovery of any loss through the Employee.

In Testimony Whereof, The United States Fidelity and Guaranty Company has hereunto set its seal. Witness the hand of its Attorney-in-Fact, on this 1st day of April, 1913.

United States Fidelity and
Guaranty Company
By C. H. Campbell,
(Seal.) Attorney-in-Fact.

This last policy was, at the request of the plaintiff in error, dated back to the first day of April, 1913.

Promptly upon the securing of this last policy the plaintiff in error discovered its loss.

As nearly as we can understand the contention of plaintiff in error, it is that this last policy dated back to April 1, 1913, operates as a renewal or a continuance of the old policy, so that we are to be held liable for losses under the old and lapsed policies.

The design of the plaintiff in error in securing this last policy from us is palpable, and it would seem a strange perversion of legal principles if it is permitted to accomplish this design. Surely it will not escape the attention of the Court that the sole purpose of the plaintiff in error in securing this last policy was to endeavor to tie it to the old policy, and thus fix a liability for losses which had occurred during the term of the policies which had lapsed.

You will notice the difference between the old lapsed policies and the new one. In the old policies

the insurer was liable for "such pecuniary loss as may be sustained by the Employer by reason of the fraud or dishonesty of the said Employe in connection with the duties of his office or position, *amounting to embezzlement or larceny.*" By the policy issued in November, 1913, the insurer is made liable for "such pecuniary loss * * * occasioned by any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication or misappropriation."

We contend that the contract of insurance is clear. It provides that we shall be liable for any loss sustained by the employer during the term of the policy and which shall have been discovered during the term thereof or within six months thereafter. The policy was continued from year to year after 1906 until April 1, 1913, when the policy lapsed. No discovery of any loss was made until more than six months after the lapse of the policy.

It is our contention that on April 1, 1913, the old policy had lapsed and on October 1, 1913 (being six months after the termination of the old policy), no loss having meanwhile been discovered, all liability ceased, and that the policy issued November 25, 1913, and dated back to April 1, 1913, was a new policy and not a renewal.

It would seem that argument is unnecessary to establish that the policy issued in November, 1913, is a new policy and not a renewal of the old. *Every term and provision of the new policy is different from the old.* The old policy held us liable only for such

pecuniary loss as the employer might sustain by reason of the acts of the employe, amounting to embezzlement or larceny. The new policy issued November 25, 1913, held us responsible for any acts of fraud, dishonesty, etc.

Judge Neterer, in the court below, had this clearly in mind when he said (Tr., p. 117):

> " 'Here are two bonds. One bond contains such rights and such obligations. Now, here is another bond. This contains broader obligations and rights.' Now, under which bond would it come? It would not come under both. If it is a continuation and a renewal, where would you be. If it is a renewal, you would have to recover under the old bond, and disregard the new one. I couldn't instruct the jury under that, because it is a renewal."

The Court can not close its eyes to the palpable intention of the plaintiff in error in securing the new form of bond. When in November, 1913, it claimed to have learned that the bond which expired April, 1913, had not been renewed, it did not apply to the surety company for a continuation certificate such as had been issued from year to year, in the form which is set forth on page 28 of the transcript, which would have continued or renewed the old form of policy, but instead applied for a new form of bond.

From a reading of the description of the acts of Mr. Mitchell set forth in the statement of counsel, printed in full in the transcript, it is quite clear that such acts would not constitute embezzlement or larceny under the common law or the Alaska statute.

Larceny is defined as follows (see *Compiled Laws of Alaska* (1913), § 1921):

> "That if any person shall steal any goods or chattels, or any Government note, or bank note, promissory note, or bill of exchange, bond, or other thing in action, or any book of accounts, order, or certificate, concerning money or goods, due or to become due or to be delivered, or any deed or writing containing a conveyance of land or any interest therein, or any bill of sale, or writing containing a conveyance of goods or chattels or any interest therein, or any other valuable contract in force, or any receipt, release, or defeasance, or any writ, process, or public record, the property of another, such person shall be deemed guilty of larceny, and upon conviction thereof, if the property stolen shall exceed in value thirty-five dollars, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years; but if the property stolen shall not exceed the value of thirty-five dollars, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than twenty-five nor more than one hundred dollars."

An accepted common law definition of larceny is:

> "* * * the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner of his ownership therein."

See 2 *Bishop on Criminal Law,* 7th Ed., § 758.

Embezzlement is defined by the Alaska Code as follows:

> "That if any officer, agent, clerk, employee, or servant of any private person or persons, co-

partnership, or incorporation shall embezzle or fraudulently convert to his own use, or shall take or secrete with intent to embezzle or fraudulently convert to his own use, any money, property, or thing of another which may be the subject of larceny, and which shall have come into his possession or be under his care by virtue of such employment, such officer, agent, clerk, employee, or servant shall be deemed guilty of embezzlement."

"That if any bailee, with or without hire, shall embezzle, or wrongfully convert to his own use, or shall secrete, with intent to convert to his own use, or shall fail, neglect, or refuse to deliver, keep, or account for, according to the nature of his trust, any money or property of another delivered or intrusted to his care or control, and which may be the subject of larceny, such bailee, upon conviction thereof, shall be deemed guilty of embezzlement."

See *Compiled Laws of Alaska* (1913), §§ 1926, 1927.

As embezzlement is purely a statutory offense we do not look to the common law for a further definition. (See 2 *Bishop on Criminal Law,* 7th Ed., § 325.)

And as to the point that the acts of Mitchell would not constitute "larceny or embezzlement," see

Guarantee Co. of No. America v. Mechanics' Sav. B. & T. Co., 100 Fed., 559;

Reed v. Fidelity & Casualty Co. of N. Y., 42 Atl., 294;

United States F. & G. Co. v. Egg Shippers' S. & F. Co., 148 Fed., 353;

Farmers' State Bank v. Title Guaranty & Trust Co., 113 S. W., 1147.

If the opening statement of counsel is to be taken as true, the acts of Mitchell with regard to the operations of the Revilla Fish Products Co. might well be said to constitute fraud, dishonesty, or wrongful misapplication, so as to bring them within the terms of the new bond. Undoubtedly this was the purpose of the plaintiff in error in securing from the company not a continuation of the old bond, such as it had secured each year, but an entirely new and different obligation. To assert, then, that the new bond written after the relations and obligations between the parties were at an end is no more than a renewal or continuation of the old bond would seem to be fallacious upon its face.

No Action Could Be Maintained on the Policy of 1911 Unless the Loss Was Discovered within Six Months After the Date of the Termination of That Policy, and Likewise as to the Policy of 1912.

That each one of the policies and renewals constituted a separate and distinct contract, and the liability upon the policy or renewal for any one year related only to losses occurring during that year and discovered within six months thereafter, is a construction based not only upon authority but upon reason. We assert that a better demonstration of the propriety of the construction we seek to place upon these contracts can not be had than is offered in the present case. Surely it is the plain duty of a

principal who has entrusted his funds to an agent, and especially when that property is made up of the funds of depositors, to maintain such a supervision and timely to conduct such investigation as will discover any peculations or fraud on the part of the agent. It is not designed that the principal may permit his agent's conduct to continue year after year without investigation. Therefore, the policies were written so as to give a reasonable length of time after the term thereof in which an investigation and discovery might be made. In this case that period is fixed at six months, and it is surely a reasonable period. At the end of that time the insurer is absolved from liability if no loss has been discovered. We are not without authority directly in point.

In the case of *Proctor Coal Co. v. U. S. Fidelity & Guaranty Co.* (Ga.), 124 Fed., 424, the bond was issued by the same company and in all essentials, as far as we can gather from the published opinion, identical with the original bond in this case.

Elliott on Insurance, Sec. 293,
Richards on Insurance, Sec.284.

...e discussion of this ... page 45 of its brief, contains unintentional misstatements as to the facts. The Court said in discussing the very contention we are now making (pp. 427-430):

> "I think the contention of counsel for defendant that these renewals are separate and distinct contracts is sound. It is urged that certain language in the bond shows that it was intended to be a continuous contract covering the period of the bond or of any subsequent renewals. The language referred to is this: 'Make good and

reimburse to the employer all and any pecuniary loss sustained by the employer', etc., 'occurring during the continuance of this bond or any renewal thereof, and discovered during said continuance, or within six months thereafter.' I am unable to agree with the argument of plaintiff as to the proper construction to be put upon this language. I think it should be construed so as to read in this way: 'Occurring during the continuance of this bond or any renewal thereof, and discovered during the continuance of this bond, or during the continuance of any renewal'; that is, that the discovery must be within six months of the expiration of the original bond, or within six months of the expiration of any renewal thereof. I do not think the language is sufficient to justify the conclusion that this was a continuous contract of suretyship running through the whole period covered by the original bond and the two renewals. The correct view seems to be that each renewal is a separate and distinct contract, and such I think is the effect of the authorities on the subject.

* * * *

"In the second renewal the language is:

" 'In consideration of the sum of twenty-five dollars, the United States Fidelity & Guaranty Company hereby continues in force bond No. 27178 in the sum of five thousand dollars,' etc.

"It is claimed that the language, 'hereby continues in force,' gives strength to the argument that the contract was a continuous one from the beginning of the original bond to the end of the last renewal.

"While there is some force in this contention, I do not think the use of this language is sufficient to change the conclusion reached that these renewals are new and distinct contracts.

* * * *

"It is claimed that, if the court should hold that the renewals are new contracts, the effect

of so holding would be to destroy the provision of the contract which gives the insured the right to discover a defalcation within six months after the termination of the bond. I do not think so. In my opinion, the whole purpose and intention of this clause is that there shall not be double responsibility on the part of the company. It is not at all inconsistent with the right to discover within six months after the expiration of the original bond or any renewal the dishonest acts of the employe, and to claim indemnity for the same. The original bond and each renewal stands for the malfeasance of the employe during the continuance of each and discovery within six months after the termination of each."

The decision of the Circuit Court of Appeals for the Third Circuit in *Fidelity & Casualty Co. v. Consolidated Nat. Bank,* 71 Fed., 116, is directly in point. In that case a bond had been issued in 1889 and regularly renewed and extended to 1894. A claim was made for an embezzlement which occurred during the last year and was timely discovered. This liability was admitted. A further claim was made for previous embezzlement not discovered within the period prescribed by the bond, it being alleged that this discovery was prevented by fraudulent concealment. The wording of the bond in that case differs slightly from that in our case. We parallel them.

"* * * which has been committed during the continuance of the said term, or any renewal thereof, and discovered during said continuance, or within six months thereafter."

"* * * and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter."

We submit that the addition of the second phrase "any renewal thereof" in our bond, which was not written in the bond of the other company, really effects no change, because if there is a renewal then there is a continuance of the term, as the two words seem to be synonymous. Upon these facts the Court said (p. 120):

> "The manifest intent was to create a bar, and to the provision inserted for that purpose there cannot be annexed an exception or qualification not warranted by its terms, and the implication of which the circumstances of the case forbid. The object was to preclude liability for a number of defaults, extending over a longer period than one year, and yet the present claim is that, in addition to $5,000, the amount of the embezzlements within such period, the indemnifying company is chargeable with the amount of other embezzlements which had been committed during a prior term. We cannot sustain this demand, because to do so would, as we think, involve a misconstruction of the condition, and the defeat of its purpose. The bank's position rests upon the assumption that it would have recovered its earlier losses, by action upon this bond, but for the fraudulent postponement of their discovery. Let this be conceded, still it is obvious that seasonable discovery of the preceding dishonest acts would have rendered the perpetration of the succeeding ones impossible, and hence that the entire liability now asserted is one which could not possibly have accrued if discovery of the earlier embezzlements had been made within the prescribed time; and it is not possible to hold, in the face of a condition limiting liability by a requirement of discovery, that, by reason of non-discovery, the liability so limited was extended or enlarged."

The case of *Florida Cent. & P. R. Co. v. American Surety Co.,* 99 Fed., 674, decided by the Circuit Court of Appeals for the Second Circuit, can not be distinguished upon principle. In that case the surety company up to 1891 annually issued a new bond of indemnity. Subsequent to that year it continued the bond in force by issuing a notice guaranteeing the employes of the railroad company. Under the terms of the original bond the company was liable only for such loss as should be discovered during the term of the bond. This was modified, however, by a rider giving six months after the term of the bond in which to discover the loss. In that case the guaranty notice issued each year did not expressly limit the term of the insurance to one year, but the Court concluded that inasmuch as it was issued annually it indicated that the meaning was that the guaranty should terminate each year unless renewed. There was in the rider a provision that the aggregate liability of the company should not exceed the amount of the last guaranty or bond. In our case there is likewise an express provision that the liability shall not exceed the amount of the one bond. Although the bond in the case we are now discussing differs in some respects from the bond in the present case, a close analysis will demonstrate they are not to be differentiated upon principle. In that case a claim was made for losses for previous years, based upon the contention that there was a continuing liability. The Court declined to sustain this contention, saying (pp. 677, 678):

"Such being the case, the meaning of the part of the contract which declares that upon the execution of a stipulated amount of risk or insurance in behalf of an employe the company shall not be responsible under any previous insurance of said employe becomes clear, and is that, when a new schedule of the amount of insurance in behalf of any employe formerly on the schedule has been executed or completed, and actually or constructively accepted, the old or previous insurance against losses previously committed by him is at an end, and that for these losses the company is no longer liable. The contract further declares that only the last insurance of the employe shall be in force at one time. These provisions are inconsistent with the theory that it was the intention or the idea of the parties that a continuing liability for old and undiscovered losses in continuous previous years was being piled up in each renewed contract."

It would seem, therefore, fair to say that our contention is directly sustained by the Circuit Court of Appeals for the Second and Third Circuits.

Nor are we lacking in direct authority from other courts.

The case of *U. S. Fidelity & Guaranty Co. v. Williams* (Miss.), 49 So., 742, presents our case almost exactly. It was a bond issued by the same company in the identical terms. We quote from the decision (pp. 743, 744):

"'In *Insurance Company v. Walsh,* 54 Ill. 164, 5 Am. Rep. 115, the court said: 'A renewal of a policy is, in effect, a new contract of assurance, and, unless otherwise expressed, on the same terms and conditions as were contained in the original policy.' To the same effect is the

case of *Brady v. Insurance Co.,* 11 Mich. 425. The court said: 'We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and was optional with both parties. At the expiration of the year over which the original policy extended, the obligation of the insured was ended, and it was only by the concurrence of the will of both parties that the obligation could be continued.' Such contracts standing as distinct and separate contracts, the rights of the parties must be determined under them as such. A renewal of the bond did not alter, change, limit, or increase the rights of the parties under the bond; nor did such renewal increase or limit the time for the performance of any act which is required to be done by the parties to maintain their rights under the bond. When the bond speaks of acts 'committed during the continuance of said renewal thereof,' it has reference to the bond as one contract and the renewals thereof as another and distinct contract. For the fraud or dishonesty of the employe during the time covered by the bond no recovery could be had under the renewal contract, nor will the contract of renewal enable the assured to maintain an action on the bond which had been barred by the lapse of time. * * * The company desired by these provisions to require vigilance on the part of the employer to discover and give notice of the fraud or dishonesty of the employe. It was of the utmost importance that this be done. The company could protect itself to some extent by having such information. It required, and had the right to expect, vigilance on the part of the employer. * * * It is not contended by counsel for appellant that the provisions of the bond limiting the liability of the company are not binding on him; but it is insisted, in effect, that a renewal of the bond in 1893 would have the effect of continuing the liability of the company for

acts committed during its continuance or renewal thereof, if the discovery should be made, and notice given thereof, within the time stated. To illustrate: Suppose the fraud and dishonesty of Ramsey on account of which this action was brought had occurred between January 19, 1891, and January 19, 1892, the period covered by the bond, and discovery could be made between January 19, 1893, and January, 1894, the period of the alleged renewal, and notice given of it would be a compliance with the terms of the contract, and the liability of the company would thus be continued. If this be a proper interpretation of the contract, then, had there been 10 renewals, the company's liability would continue under them for acts committed during the first year of the guaranty. As heretofore stated, we believe the bond is a distinct contract, and the renewals are separate and distinct contracts, but out of the same terms of the bond. Therefore the liability of the company for an act committed during a given period must be determined by the terms of the contract in force at the time of its commission, and a subsequent renewal does not extend the time for the disclosing of the wrong and the enforcement of a liability of the company therefor.' See, also, the cases of *First Nat. Bank of Nashville v. United States Fidelity & Guaranty Co.*, 110 Tenn. 10, 75 S. W. 1076, 100 Am. St. Rep. 765, *Proctor Coal Company v. United States Fidelity & Guaranty Co.* (C. C.), 124 Fed. 424, *Fidelity & Casualty Co. v. Consolidated Nat. Bank*, 71 Fed. 116, 17 C. C. A. 641, and many other authorities cited in *Frost on Guaranty Insurance* (2d Ed.), p. 99, § 40 *et seq.*

"These bonds are separate and distinct contracts, and do not constitute a continuing bond, as contended by counsel for appellee. Each bond is liable for such losses, and only such losses, as occur during its separate life, which is fixed by the contract for

> one year each, and discovered during the continuance or renewal, or within six months after the expiration of the year, but always limiting the right of recovery to losses which actually happen within the life of the particular bond."

In *Long Bros. Grocery Co. v. United States F. & G. Co.* (Mo.), 110 S. W., 29, a bond had been issued which was continued in force by a renewal certificate. The claim was made that inasmuch as the original bond was void because of misrepresentations the same vice was carried into the second bond evidenced by the renewal; but the Court held that this contention could not be sustained inasmuch as the renewal evidenced a separate and distinct contract, saying (p. 31):

> "The rule is generally recognized that: 'A renewal of a policy constitutes a separate and distinct contract for the period of time covered by such renewal. It is, however, a contract with the same terms and conditions as is evidenced by the bond which is renewed, because the renewal receipt recites that it is renewed in accordance with the terms of the bond."

In the case of *Brady v. The Northwestern Ins. Co.*, 11 Mich., 425, 443, it is said:

> "We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and was optional with both parties. At the expiration of the year over which the original policy extended, the obligation of the insurer was ended, and it was only by the concurrence of the will of both parties that the obligation could be continued. This concurrence is manifested by the payment of a consideration by the one party, and a renewed promise by the

> other; and an obligation revived or continued under such circumstances, is an original obligation. It must be asked for by the one, and may be assumed or refused by the other; and the policy, which is its evidence, is therefore only continued by the positive act of both parties. This is according to the terms of the policy, and of the certificate of renewal; and the fact that the insurance company, by the very terms of the certificate of renewal, required payment therefor, and that such certificate should be countersigned by the resident agent before it should become operative, shows that the company regard the renewal as a new contract, made at their option, and dependent in some degree upon the judgment and knowledge of such agent."

The plaintiff in error cites against these cases *United States F. & G. Co. v. Citizens' Nat. Bank of Monticello,* 143 S. W., 997, and *United States F. & G. Co. v. Shepherds' Home Lodge No. 2,* 174 S. W., 487. If these two Kentucky cases adopt a rule contrary to our contention, we can only say that they put themselves in opposition to the decisions we have cited and in opposition to the generally accepted rule. While they appear at first blush to be in point and to sustain the contention of counsel that the original bond and renewal certificates constitute one continuous contract, they may nevertheless upon close consideration be differentiated. In the first place the Court of Appeals of Kentucky in the *De Jernette* case (*De Jernette v. Fidelity & Casualty Co.* (Ky.), 33 S. W., 828) had construed a contract and renewals similar to those in the present case as constituting

separate and distinct contracts; and the Court bases this conclusion upon the fact that renewal certificates were issued for a definite period, *just as they were issued here.* (See Tr., p. 28.) The Court said (p. 829):

> "When the bond speaks of acts 'committed during the continuance of said renewal thereof,' it has reference to the bond as one contract and the renewals thereof as another and distinct contract. For the fraud or dishonesty of the employed during the time covered by the bond no recovery could be had under the renewed contract, nor will the contract of renewal enable the assured to maintain an action on the bond which had been barred by the lapse of time."

Applying the above rule to the facts of the *De Jernette* case, the Court there held that notwithstanding the renewal there could be no recovery upon the old bond when the loss had not been discovered within three months after its expiration. Thus the rule stood in Kentucky when the two later cases were considered. In each of these cases the conclusion that the bond and renewals constituted one continuous contract was predicated upon letters written by the surety company which treated them as one continuous contract. In other words, the conclusion was based upon what appeared to be a practical construction given by the parties to the contract. That the Court did not intend in the later decisions to overrule the *De Jernette* case is clearly evident from the following language in the *Shepherds' Home Lodge* case (174 S. W., 487, 489) where it is said:

"The letter written by the company on February 1st, quoted above, treats the present contract as a 'renewal,' and requests payment of premium, so that a 'continuation certificate or a new bond' may be issued. The words, 'renewal', 'continuation certificate' and 'new bond' must have been used synonymously, and the company clearly intended them as renewals, with the effect which the court gave them. The officers of the lodge so considered them, for the certificate of fidelity, which we have already copied and referred to, concludes with the statement: 'We know of no reason why the guaranty bond may not be continued.'

"We do not believe the facts of this case bring it within the rule of *De Jernette v. Fidelity & Casualty Co.*, 98 Ky. 558, 33 S. W. 828, 17 Ky. Law Rep. 1088. In that case indemnity was afforded from year to year by renewal receipts, *and it was specifically stated in each that only the annual period was covered.*" (Italics ours.)

Furthermore, it does not appear that the bond in either of the last two Kentucky cases contained the provision which is in our bond, as follows (Tr., p. 26):

"That the Company, upon the execution of this Bond, shall not thereafter be responsible to the Employer, under any bond previously issued to the Employer on behalf of said Employe, and upon the issuance of any Bond subsequent hereto upon said Employe in favor of said Employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) Bond shall be in force at one time, unless otherwise stipulated between the Employer and the Company."

Or, if those bonds did contain such a provision no

consideration was given it. This clause last quoted means something, and there is no reason why we should not give it the meaning which its plain language implies. It would seem palpably fallacious to contend that the old bond is in force or that there could be responsibility under it when it expressly provides that responsibility under it shall cease and determine when the new bond is issued.

Reading the clause last quoted, together with the clause which requires discovery to be made within six months after the end of the term, the meaning is clear to this effect: At the end of one year, or upon the issuance of a new bond, there is no liability for any loss except such as was occasioned during that year, and at the end of six months after the end of that year all liability ceases for any loss not suffered within the twelve months and discovered within eighteen months. To hold otherwise is to fail to give effect to the clause quoted.

The plaintiff in error relies with confidence upon the Tennessee case, *First National Bank v. Fidelity & Guaranty Co.,* 110 Tenn., 10, 100 Am. St. Rep., 765. The writer of the brief could not have given careful consideration to that case or to the language of the bond construed. The language there is (p. 773):

> " 'Make good and reimburse to the employer to the extent of seven thousand dollars, and no further, all and any pecuniary loss sustained by the employer, occasioned by the fraud or dishonesty on the part of the employe in the employer's service, and occurring during the continuance of this bond or any renewal thereof, and discovered

during such continuance or renewal, *or any time thereafter.'"* (Italics ours.)

It will be readily observed that the last phrase differentiates the case entirely from the present case, for there the right to recover for a loss under any one of the bonds or renewals would only be limited by the general statute of limitations.

The case of *Philadelphia Casualty Co. v. Fechheimer,* 220 Fed., 401, from the Circuit Court of Appeals for the Sixth Circuit, referred to by plaintiff in error, is by no means in point. There was an indemnity bond insuring against loss on commercial accounts. There was a provision that losses occurring on goods shipped under the old bond would be covered under the renewal bond: "If this bond is renewed on or before the date of termination thereof by the issuance of a new bond," etc. A new bond was issued, and the contention was offered that it was not a renewal of the old bond because it did not so state expressly. The attenuation of such a contention is manifest, and the Judge in writing the opinion merely says that it is manifest from the clause above quoted that the renewal contemplated by the parties was to be by the issuance of a new bond.

We believe it will serve no useful purpose to encumber the brief further by an analysis of the other cases to which counsel refers in his brief.

The opinion written by Mr. Justice Lurton and the opinion written by Judge Taft, referred to in the

brief, are in cases which bear no analogy whatever to the case at bar, and an examination will convince the Court that the same may be said of all the other cases quoted in support of this particular contention of counsel. We conclude, therefore, that each renewal constituted a new and independent contract running for one year, and that all liability upon each one of these contracts for an undiscovered loss occurring during the year terminated at the end of six months after the end of the year.

The Action of the Court in Rejecting Offer of Evidence.

We believe the fallacy of counsel's contention in this regard will appear from a statement of what actually occurred.

We moved to exclude testimony touching any alleged loss occurring prior to April 1, 1913, for the reasons that it appeared from the complaint and the statement of counsel that no loss was discovered until more than six months subsequent to April 1, 1913.

Counsel for plaintiff in error then made the following offer (Plaintiff's Brief, p. 11):

> "Mr. Roberts: Now, I desire, if the Court please, to offer at this time to prove that the renewal, or so-called renewal, or what is called by counsel the last bond, was given as a renewal, and was, as a matter of fact, a continuation of the contract of insurance and one of the continuations by renewal from year to year from 1906, and that it was agreed between the Miners & Merchants Bank and the United States Fidelity & Guaranty Company that said contract of insurance should be continued and renewed from year to

> year, and that the bond or instrument dated April 1st, 1913, was executed and delivered as a renewal and continuation of the former contract of insurance; and to prove all the allegations of plaintiff's complaint."

We understand counsel's contention to be that he was entitled to prove that the bond issued in November, 1913, dated back to April 1, 1913, was given as a renewal and a continuation of the original contract of insurance evidenced by the bond dated in 1906.

We are willing to concede the rule that rejected offers must be considered as proven for the purposes of such a motion as was made in this case, but we will not concede that a Court is bound to sit by and entertain an offer to prove something which is contrary to an admitted fact.

The bond dated April 1, 1913, is not a renewal or continuation of the old contract. It is a new bond, complete in itself, containing conditions totally unlike the conditions of the other bond. No construction or extraneous evidence could make it otherwise unless it made it a contract entirely different from what it is.

The plaintiff in error pleaded and relied upon this new bond, and set it forth in terms in its complaint. It says in its complaint (see Tr., p. 8):

> "That on the 1st day of April, 1913, the defendant, United States Fidelity & Guaranty Company, made, executed and delivered to the plaintiff a certain bond in writing, a copy of which is hereto attached marked Exhibit 'C' and made a part of this complaint. That said bond was given by the defendant corporation to the plaintiff bank by, through, under and in pursu-

ance of the original agreement and contract indemnifying and insuring said bank as hereinabove stated and as a part of the same transaction."

The "transaction" referred to is set forth in paragraphs IV and V of the complaint (see Tr., pp. 3 and 4), being to the effect that the company agreed to issue a bond and to keep the same renewed from year to year, and further agreed to issue the best bond and the highest grade of insurance to be had in that line of surety and fidelity insurance. But, counsel upon the trial expressly stated that he would not offer any testimony to the effect that the company agreed to furnish the most favorable form of insurance policy. (See Tr., pp. 87 and 105.) Therefore, all there can be to the agreement is that the surety company was to keep the insurance renewed from year to year. In other words, having issued a policy in 1906, it would keep this policy renewed from year to year.

But, in November, 1913, the plaintiff in error made an entirely different arrangement with the surety company, and, for reasons manifest, took an entirely different contract of insurance. Therefore, if there ever was such an agreement on the part of the surety company to keep the old policy renewed from year to year, the plaintiff in error, of its own volition and in order to secure a fancied advantage, abandoned that agreement and took a new and entirely different contract.

It is manifest that the offer made by counsel was an offer to prove that the contract which he had

pleaded and upon which he relied was something other and entirely different. In other words, he pleaded and relied upon one contract and offered to prove another. We submit that the Court below was right in declining to entertain such an absurdity.

Plaintiff in error, having accepted the contract dated April 1, 1913, as it was written, is now estopped from proving that it is another contract than it purports to be. For these reasons it is deemed entirely unnecessary to discuss the various authorities cited by counsel to the point that oral testimony will be heard to enlarge or modify the terms of the written contract.

Of course, it goes without saying that if the contention we have previously made is correct it would make no difference what counsel proved as to the agreement to renew or continue the bond of 1906, because, in any event, all liability under the bond dated in 1911 and the bond dated in 1912 terminated when six months had elapsed without the discovery of any loss.

But is it not a fact that counsel attaches a significance to the term "renewal" which it does not deserve? Broadly speaking, perhaps, whenever one who has had insurance secures another policy, whether the old policy has lapsed or not, it amounts to a "renewal" of the insurance, and in that sense the term may be applied to any new insurance. Here, however, we have a case where not only had the policy lapsed but all liability was at an end. It seems hardly possible that, whether the new policy be called a re-

newal or designated by any other term, it could operate to revivify a liability or responsibility for past acts which was dead. Yet that, in its last analysis, must be the plain contention of counsel.

Parole proof would, of course, not be admissible to vary or enlarge the terms of the contract. Counsel, however, stated that he had written evidence, and we must take him at his word.

Now, if there was any writing contemporaneous with the new bond, or even collateral thereto, which would translate the bond into something other than what it is upon its face, such writing was as much a part of the contract as was the bond itself, and instead of pleading and relying upon the bond Exhibit "C" the plaintiff should have pleaded its entire contract. Failing to do so, it is bound by the contract it pleaded and limited to such evidence as will sustain that contract and not an entirely different one.

The Plaintiff in Error Has Mistaken Its Remedy.

A reading of the complaint in this action will convince that the plaintiff in error has mistaken its remedy. It seeks to recover upon a bond which was not issued, relying upon the contract alleged in paragraphs IV and V of its complaint. If it be true that the surety company agreed to issue a bond and to renew it year by year and did not do so, it should sue first to have its bond established, and, having secured the reinstatement of such a bond as it thinks should have been issued, to sue upon that bond.

Indeed, it is not easy from a cursory reading of the complaint to determine just the way the plaintiff in error is endeavoring to shape its action. According to paragraph IV of its complaint, there was an agreement that the surety company would from year to year keep the insurance in force without "trouble or annoyance to the plaintiff or its officers, *except the payment of the annual premium.*" The bond was renewed from time to time and the premium paid from time to time so that the last bond terminated April 1, 1913. Then over six months was permitted to elapse, no renewal or new bond being issued *and no premium paid.*

Thereupon and after all rights and obligations had terminated the parties meet again, and the bond of November 25, 1913, is issued as evidencing the contract of the parties. Now it seems to be the theory that this contract made in November is not only what it purports to be, to-wit, a contract insuring against the dishonest acts of Mitchell from April 1, 1913, until it should be terminated, but that it is something more—that it is a contract resurrecting and re-establishing a liability which had lapsed for acts occurring in 1911 and 1912. In other words, that this instrument is not the real contract of the parties. Plaintiff in error, having brought the action as it did and so shaped its pleadings, now asserts that it is entitled to prove another and a different contract. We respectfully submit this is not a question of evidence but involves a question of procedure.

The plaintiff in error brought its action upon the law side of the Court, and now seeks either to recover upon a contract which is not in existence or to reform the terms of one which is. It is elementary that this may not be done in the Federal Courts, but that plaintiff in error should have gone into equity first to establish or reform its contract before it sued upon it at law.

But, perhaps there is another possible theory in the mind of plaintiff in error. It alleges that we agreed to keep the bank insured against the acts of Mitchell; this we failed to do. Now, if the bank had a valid and enforceable contract obligating us to issue insurance each year and we failed to comply with that contract, by reason whereof plaintiff in error suffered damages perhaps (and we say "perhaps"), there would be an action against us to recover such damage. But that would be another action; and that is exactly what the Court below had in mind when it said (Tr., p. 118):

> "Now, as to the statement in relation to failure on the part of the insurance company to renew this bond, and that there was an agreement on their part to keep it in force, that can't obtain here. If there was any negligence here, the cause of action arose because of the act or failure of the company to do what it had agreed to do, and that would be another cause of action. That would not be this action—but an action upon a contract. That is upon another ground or theory, and could not be invoked here."

Groping as we are to discover the real theory under which plaintiff in error is seeking to recover,

this may be suggested: That perhaps it is the theory of plaintiff in error that the last bond was given as a continuation of the old bond and that it can recover upon both. This theory would seem to leave the plaintiff in error in no better predicament, for surely it can not maintain an action upon both bonds for the same act. The Judge below understood this when he said (Tr., p. 117):

> "If it is a continuation and a renewal, where would you be. If it is a renewal, you would have to recover under the old bond, and disregard the new one."

To notice further the authorities which the plaintiff in error has cited and quoted from would be to extend this brief beyond the limit which we think the case demands.

The plan conceived by the plaintiff in error is altogether too apparent, and we can not believe that the law will lend countenance to it.

To summarize the questions presented by the record in this case, we submit that the judgment of the Court below must be affirmed for the following reasons:

1st: No contention is made by plaintiff in error in its assignments of error or in its brief that the loss suffered by the plaintiff through the alleged acts of "fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication or misappropriation or any criminal act" by Mr. Mitchell subsequent to April 1, 1913, under the last bond, was in excess of the sum of $688.27, for which judgment was stipulated in the Court below.

2nd: That it appears from the statement of counsel that none of the acts charged against Mr. Mitchell would constitute "larceny or embezzlement" under the common law of Alaska.

3rd: That it is shown by the record that each renewal of the original bond was a new contract, liability under which expired six months after the date of expiration of the renewed bond.

4th: That if we should concede plaintiff in error's contention that the renewal certificates were not new contracts but the effect thereof was to continue in force the old bond for an additional and not a new contract period, then the bond expired on April 1, 1913, and no discovery of any loss thereunder was made within six months after the date of its expiration.

5th: That it is not claimed by plaintiff in error that there was any agreement at the date of the issuance of the last bond on November 25, 1913, or at any time, waiving the provision of the old bond exonerating the surety in case of failure to discover "fraud or dishonesty" amounting to "embezzlement or larceny" within six months after the date of expiration of the old bond.

6th: That the alleged agreement of April 1, 1906, by which it is alleged the surety company agreed to keep the bond renewed from year to year without any "trouble or annoyance to the plaintiff or its officers," if enforceable at all, referred to the original bond and was waived or abandoned by the new bond issued

November 25, 1913, reducing the annual premium and adopting an entirely new agreement by which the mutual rights and obligations of the parties were to be determined.

Respectfully submitted,

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